



Clause 4.6 Variation Request

402 Macquarie Street, Liverpool

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1.0 The Proposal

This request is written in support of a Stage 1 Concept Development Application that proposes the construction of a 31-storey mixed use building at 402 Macquarie Street, Liverpool (Site).

This Clause 4.6 Request relates to a variation proposed to Council's Building Separation in Liverpool City Centre control as prescribed by Liverpool Local Environmental Plan (LEP) 2008.

1.1 Relevant Case Law

Clause 4.6 of within the Liverpool Local Environmental Plan 2008 (LLEP 2008) allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP.

Clause 4.6 (3) of the LEP provides:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

Further Clause 4.6(4) provides that:

(4) Development consent must not be granted for development that contravenes a development standard unless:

- (a) the consent authority is satisfied that:*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) the concurrence of the Secretary has been obtained.*

The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court (the Court) and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Randwick City Council V Micaul Holdings Pty Ltd* [2016] NSWLEC 7;
4. *Brigham v Canterbury-Bankstown Council* [2018] NSWLEC 1406;
5. *Initial Action v Woollahra Municipal Council* [2018] NSWLEC 118; and
6. *Turland v Wingercarribee Shire Council* [2018] NSWLEC 1511.

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42]-[51] and repeated in *Initial Action* [17]-[21]. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6 (*Initial Action* [16]):

1. *The objectives of the development standard are achieved notwithstanding noncompliance with the standard;*
2. *The underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;*
3. *Underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;*
4. *The development standard has been abandoned by the council; or*
5. *The zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).*

The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).

The environmental planning grounds relied on in the written request under cl 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* [24]).

1.2 Relevant Development Standard

The development standard to which this objection relates is Clause 7.4 Building Separation in Liverpool City Centre. Clause 7.4 of Council's Building Separation control sets out the following:

- (1) *The objective of this clause is to ensure minimum sufficient separation of buildings for reasons of visual appearance, privacy and solar access.*

- (2) *Development consent must not be granted to development for the purposes of a building on land in Liverpool city centre unless the separation distance from neighbouring buildings and between separate towers, or other separate raised parts, of the same building is at least:*
- (a) *9 metres for parts of buildings between 12 metres and 25 metres above ground level (finished) on land in Zone R4 High Density Residential, and*
 - (b) *12 metres for parts of buildings between 25 metres and 35 metres above ground level (finished) on land in Zone R4 High Density Residential, and*
 - (c) *18 metres for parts of buildings above 35 metres on land in Zone R4 High Density Residential and*
 - (d) *12 metres for parts of buildings between 25 metres and 45 metres above ground level (finished) on land in Zone B3 Commercial Core or B4 Mixed Use, and*
 - (e) *28 metres for parts of buildings 45 metres or more above ground level (finished) on land in Zone B3 Commercial Core or B4 Mixed Use.*

Comment

The subject site is zoned B4 mixed use under the provisions of the LLEP 2008 and this development standard is applicable to the proposed concept development. The applicable building separation between neighbouring buildings for this development is 12m, for parts of the building between 25m and 45m above ground level (finished), and 28m for parts of buildings 45m or more above ground level (finished).

It is generally applicable that half the building separation distance is provided to allow for future development on adjoining lots to provide the other half of the building separation distance ensuring compliance with Clause 7.4 is achieved. This rationale has been adopted from Council's assessment of **DA48/2015** at 166-176 Terminus Street, Liverpool (the adjoining site to the east).

This DA proposes a mixed-use building within the Liverpool City Centre that incorporates a maximum building height of 104.9m, therefore this clause is applicable to the top of level 7 and above of the proposed concept development.

1.3 Is the Planning Control in Question a Development Standard?

'Development Standards' are defined under Section 1.4(1) of the EP&A Act as follows:

“Development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements, or standards in respect of: ...

- (a) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work...”*

Comment:

As defined above, the building separation control under Clause 7.4 of LLEP 2008 is clearly identifiable as a development standard.

2.0 The Contravention

The proposal results in the following variation to Council's Building Separation in Liverpool City Centre Control as demonstrated in the table below:

Table 1: Proposed Separation Distances			
Proposed Level	Required Separation Distance	Proposed Separation Distance (Rear Boundary)	Proposed Separation Distance (Eastern Side Boundary)
Levels 7-14	Building to Building 12m	7m to Boundary (levels 7 & 8)	Nil to Boundary (levels 7 & 8 only)
	Building to Boundary 6m	11.46m to Boundary (levels 9-14)	12m to Boundary (levels 9-14)
Level 15 & above	Building to Building 28m	N/A	12m to Boundary
	Building to Boundary 14m	The maximum building height of the site to the rear cannot exceed 45m as per the applicable LEP height control.	12m to Boundary

Comment:

The development therefore results in non-compliance with the building separation distance provided at the north-eastern side boundary only. This non-compliance is discussed below:

- Levels Between 25m and 45m**

A small portion of the top of proposed level 7 and level 8 exceeds a height of 25m and is proposed with a nil side setback to the north-eastern boundary. The adjoining tower at 166-176 Terminus Street, Liverpool has been approved with levels 7 and 8 achieving a 6.1m setback to the sites south-western boundary.

Therefore, a minimum setback distance of 5.9m would need to be provided to this side boundary to be compliant. Proposed levels 9-14 provide a minimum setback distance of 12m that is compliant with this control.

- **Levels 45m and Above**

Clause 7.4 (e) requires a building separation of 28m for parts of buildings 45m or more above ground level (finished). The existing mixed-use development to the eastern side boundary is eight storeys high and is unlikely to be redeveloped in the near future, so the proposal would have no impact to this adjoining site, despite the proposed 14.26% (2m) variation to the control.

Therefore, the subject site is irregular in shape containing a splayed frontage and tapering lot width at the rear. The development has been designed to respond to the site's constraints, provide an active street frontage and tie into the proposed concept development proposed on the adjoining site at 180-188 Macquarie Street, Liverpool. Full compliance would render a third of the site undevelopable resulting in an undesirable built form on site and achieve a floor plate inappropriate for development.

In addition, the contravention only applies the portion of the adjoining building at 166-176 Terminus Street, Liverpool on levels 7 and 8 only, at a depth of 12m. As illustrated in the **Figures 1 and 2, DA48/2015/B** approved a 9-storey mixed use building with levels 7 and 8 stepped with a side setback of 6.1m to the sites south-western boundary, this boundary adjoins the proposed concept development.



Figure 1: Western elevation of adjoining mixed-use building at 166-176 Terminus Street, Liverpool approved under DA48/2015. Level 7 & 8 achieve a 6.1m setback to sites south-western boundary.

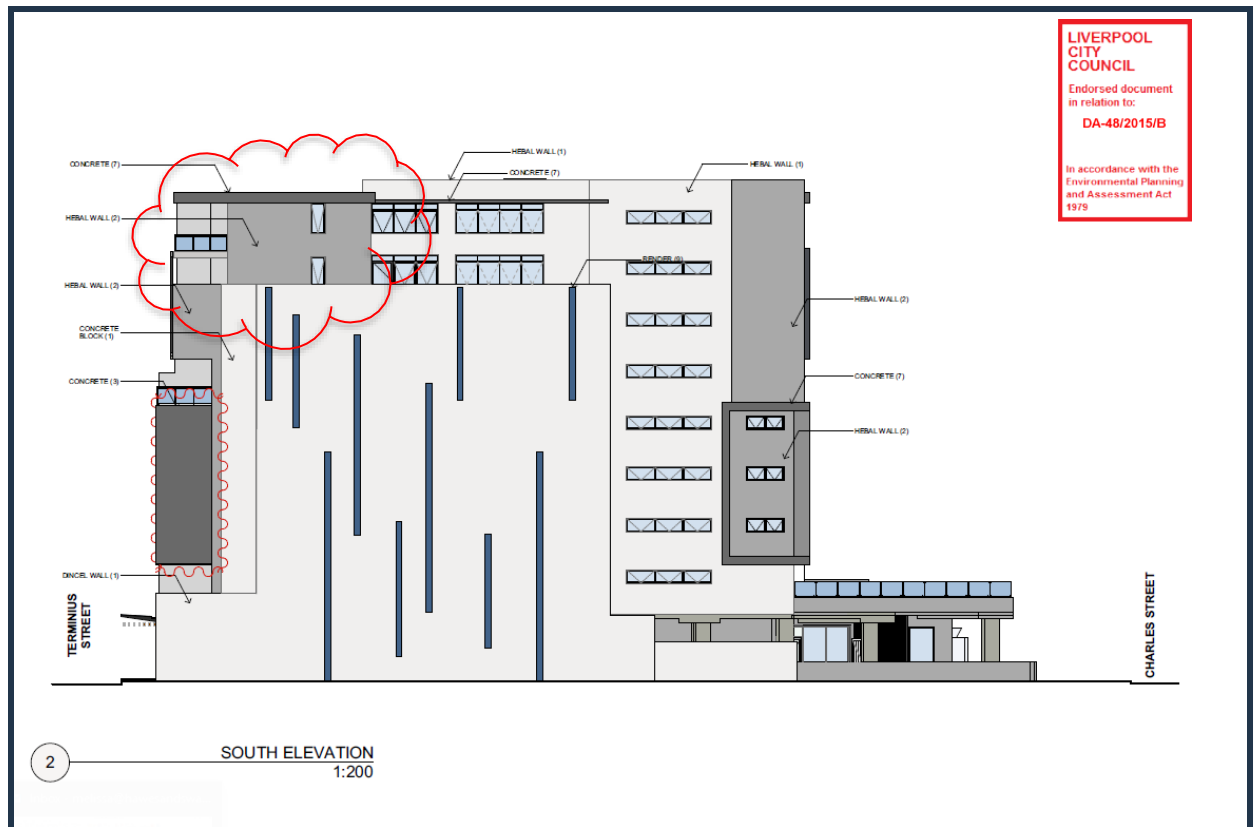


Figure 2: South Elevation of adjoining mixed-use building at 166-176 Terminus Street, Liverpool approved under DA48/2015. The area within red cloud denotes the building depth of Level 7 & 8 and does not extend the length of the site.

3.0 Justification of the Contravention

3.1 The Site Context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. The site and its surrounds as existing are a mix of residential and commercial uses. The site is identified as being located in the Liverpool City Centre, which is currently undergoing redevelopment.

Furthermore, the Liverpool LEP 2008 (Amendment No. 52) identifies the site as a 'key-site' within the mid-rise precinct of Liverpool City Centre that encourages better built form outcomes by relating the floor space ratio to building typology and public domain outcomes.

Of note, the adjoining property at 166-176 Terminus Street, Liverpool is currently undergoing redevelopment with other larger residential towers currently underway within in the Liverpool CBD. There are a number of draft masterplan concept proposals in place such as Georges River and the Liverpool City Centre Precincts that illustrates the strong urban growth ahead. The recently completed developments such as the Skyhaus and Paper Mill Developments that have now set new benchmarks in development envelopes and urban regeneration of Liverpool.

3.2 Public Interest

Clause 4.6(4)(a)(ii) of LLEP 2008 requires that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed concept development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The proposed concept development has been assessed against the objectives for the B4 Mixed Use zone and Liverpool City Centre below. Despite the proposed variation to Council's building separation, the proposal is considered to be in the public interest as it satisfies the objectives of the zone, the Liverpool City Centre and the objectives of the development standard.

3.3 Consistency with B4 Mixed Use Zone

The consistency of the proposal against the objectives of the B4 Mixed Use Residential zone is outlined below.

- **To provide a mixture of compatible land uses**

The proposed concept development provides a compatible land use that is consistent with the future character of the Liverpool City Centre. It proposes a mix of residential units and commercial space designed to contribute to a compatible built form.

- **To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.**

The concept proposal provides a high-density development in an accessible location that maximises public transport patronage and encourages non-vehicular transport.

- **To allow for residential and other accommodation in the Liverpool city centre, while maintaining active retail, business or other non-residential uses at street level.**

The concept proposal consists of a high-density residential development that is consistent with the future character of the area. The development will generate demand and opportunities for businesses to service the area and contribute to the economic growth of Liverpool City Centre. Commercial uses of the building are to be located at the ground floor level fronting Macquarie, Terminus a Carey Streets therefore contributing towards providing an accessible, attractive, and safe public domain.

- **To facilitate a high standard of urban design, convenient urban living and exceptional public amenity.**

The concept proposal will provide for a high standard of high-density urban living within the Liverpool City Centre. Various design features of the building, such as communal neighbourhood terraces, will deliver a high standard of urban design and provide exceptional public amenity.

3.4 Consistency with Development in Liverpool City Centre

The consistency of the proposal against the objectives of for development in the Liverpool City Centre (Clause 7.1 of LLEP 2008) is outlined below.

- **To preserve the existing street layout and reinforce the street character through consistent building alignments**

The proposed variation to the eastern-side boundary is suitable for development in the Liverpool city Centre as it preserves the existing street layout and character. The part of the building that the proposed variation occurs (refer to Figures 1 & 2 above) does not result in adverse bulk and scale massing of the building or negatively impact on the streetscape.

- **To allow sunlight to reach buildings and areas of high pedestrian activity**

Solar access diagrams have been submitted with the application that demonstrate the proposed concept development does not adversely impact solar access to the surrounding properties or the public domain. The minor non-compliance will not impact the solar amenity of the adjoining property.

- **To reduce the potential for pedestrian and traffic conflicts on the Hume Highway**

The proposed concept development is likely to be visible from the Hume Highway however, the nature of the proposal and area of non-compliance will not cause any pedestrian or traffic conflicts on the Hume Highway.

- **To improve the quality of public spaces in the city centre**

The proposed variation occurs at the northeastern side boundary that the podium level of the development and will not adversely impact upon the quality of public spaces in the city centre.

- **To reinforce Liverpool railway station and interchange as a major passenger transport facility, including by the visual enhancement of the surrounding environment and the development of a public plaza at the station entry**

The proposed concept development is located within 800m of the Liverpool Train Station and bus interchange and will significantly enhance the quality of the surrounding environment.

- **To enhance the natural river foreshore and places of heritage significance**

The concept development will have no impact on the natural river foreshore and/or any places of heritage.

- **To provide direct, convenient, and safe pedestrian links between the city centre (west of the rail line) and the Georges River foreshore.**

The proposal does not adversely impact on pedestrian links between the city centre and Georges River foreshore.

3.5 Consistency with Objectives of the Building Separation in Liverpool City Centre Control

The consistency of the proposal against the objectives of the building separation in Liverpool City Centre control is outlined below:

- **To ensure minimum sufficient separation of buildings for reasons of visual appearance, privacy and solar access.**

The proposal consists of an architecturally designed high density residential development with ground floor commercial space at that meets the needs of the desired future character of the area. The proposed concept development has been well articulated through the use of stepping of the built form and incorporating a range of finishes and materials that positively complement the existing streetscape.

The adjoining tower at 166-176 Terminus Street, Liverpool proposes construction to up to levels 7 and 8. Levels 7 and 8 contain a wraparound balcony to the southern elevation, refer to Figure 2 above. The concept development proposes a blank wall within this interface to ensure the neighbouring properties privacy is retained and protected. This is a design method commonly adopted in city centre areas in accordance with the provisions of Section 2F Building Separation of the Apartment Design Guide (ADG) to maintain privacy to adjoining properties on main streets.

Solar access diagrams have been submitted with the application that demonstrate that the proposed concept development does not adversely impact the surrounding properties solar access. The minor non-compliance will not impact the solar amenity of the adjoining property.

Therefore, the proposal does not adversely impact upon the visual appearance of the building or privacy and solar access of adjoining properties.

4.0 Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case (Clause 4.6(3)(a))?

Clause 4.6(3)(a) of the Liverpool LEP 2008 requires the departure from the development standard to be justified by demonstrating:

- ***Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case***

Comment

As detailed in the section above, the proposal maintains the future higher density built form that is at a scale comparative to the site's location within the Liverpool City Centre. The numeric non-compliance to building separation for the proposed concept development is approximately 5.9m to adjoining levels 7 and 8 and 2m from levels 15 and above.

Strict compliance with the control is considered to be unreasonable and unnecessary in the site circumstances for the following reasons:

- The proposal will continue to achieve the objectives of the building separation in Liverpool City Centre development standard of LLEP 2008.
- The non-compliance results from the irregular shape of the site to provide a desirable built form on site and achieve a floor plate appropriate for development.
- The adjoining tower at 166-176 Terminus Street, Liverpool proposes construction to up to levels 7 and 8. The concept development proposes a blank wall within this interface that is a design method commonly adopted in city centre areas in accordance with the provisions of Section 2F Building Separation of the ADG to maintain privacy to adjoining properties on main streets.
- The communal open space area located on the podium level (level 8) is a non-habitable space that does not directly interface the adjoining building that has approval for a maximum height of 8 storeys.
- The minor non-compliance will not impact the solar amenity of the adjoining property.
- The proposal does not adversely impact upon the visual appearance of the building or privacy and solar access of adjoining properties.
- The adjoining property has recently been development and is unlikely to undergo redevelopment in the near future.

Therefore, it is considered that the objectives of the development standard are met notwithstanding the breach of Council's building separation in Liverpool City Centre control, so strict compliance with the control is unreasonable and unnecessary in the site circumstances and site context.

5.0 Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard (Clause 4.6(3)(b))?

Clause 4.6(3)(b) of Liverpool LEP 2008 requires the departure from the development standard to be justified by demonstrating:

- ***There are sufficient environmental planning grounds to justify contravening the development standard***

Comment

It is our opinion that there are sufficient environmental planning grounds to justify contravening the building separation in Liverpool City Centre development standard in this instance. These are as follows:

- The proposed concept development is consistent with the objectives of the zone and the objectives of building separation in Liverpool City Centre control.
- The minor variation only applies between towers to adjoining levels 7 and 8 at a depth of 12m and the proposed concept development proposes a blank wall to this section ensuring privacy to the adjoining site is retained. This is a design method commonly adopted in city centre areas in accordance with the provisions of Section 2F Building Separation of the ADG to maintain privacy to adjoining properties on main streets.
- The variation largely results from the irregular shape of the site to provide a desirable built form on site and achieve a floor plate appropriate for development.
- The proposal does not result in any adverse impact from adjoining properties.

It is considered the objectives of the LEP 2008 building separation in Liverpool City Centre development standard are achieved in this instance where the proposal results in the provision of high-quality residential amenity and a high-quality built form. In addition, the provision of a blank wall to the section of building that is directly opposite the balcony of the adjoining tower ensures privacy to the adjoining site is retained.

Strict compliance with the building height development standard would require a setback of essentially a third of the site area to remain clear of development from 25m - 45m above the ground floor (finished) and would significantly reduce the site's ability to provide a floor plate appropriate for development therefore reducing the sites potential to facilitate higher density residential development.

With regard to the above, it is considered that there are sufficient environmental grounds to justify in varying the building separation control.

6.0 Is the proposed development of public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (Clause 4(a)(ii))?

Clause 4.6(4)(a)(ii) of Liverpool LEP 2008 requires the departure from the development standard to be justified by demonstrating:

- ***The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.***

Comment

It is our opinion that the lot size of the subject site is consistent with the objectives of the Liverpool City precinct and B4 Mixed Use zoning.

In addition, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape outcomes associated with the minor variation.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP, and that there are no adverse or unreasonable impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the lot size control.

7.0 Conclusion

The proposed contravention of the building separation in Liverpool City Centre control of Clause 7.4 is based on the reasons outlined in this request.

It is considered that this proposal represents an individual circumstance in which Clause 4.6 was intended and to be available to set aside compliance with unreasonable or unnecessary development standards. The proposal will not result in the setting of an undesirable development precedent.

As demonstrated throughout this statement, it is evident that:

- The applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- The applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- The proposed concept development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

In view of all of the above, it is considered that this written request has adequately addressed the matters required by Clause 4.6(3) of LLEP 2008 and Council's support to contravene the building separation in Liverpool City Centre of Clause 7.4 is therefore sought.



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